85-829

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE A. CREED & SON, INC.,
Petitioner,

v.

TRIDENT TECHNICAL COLLEGE and
LUCAS & STUBBS, LTD.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Arbitration Panel's refusal to allow written briefs on relevant issues or to permit oral argument violate Petitioner's right to due process?

2. Does the Federal Arbitration Act exclude the provision of the South Carolina Arbitration Act where there is no conflict between the two statutes?

3. Should a lump-sum arbitration award be vacated when it is admitted that there is no evidence to support a material portion of the award?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO._____

George A. Creed & Son, Inc.,

Petitioner,

vs.

Trident Technical College and
Lucas & Stubbs, Ltd.,

Respondents.

On Writ of Certiorari To the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

1. OPINIONS BELOW

The opinion of the Supreme Court for the State of South Carolina, Opinion

No. 22350, filed July 8, 1985 set forth in the Appendix.

2. JURISDICTION

The Jurisdiction of this Court to review the decision of the South Carolina Supreme Court is invoked pursuant to 28 U.S.C. §1257(3).

3. QUESTION PRESENTED FOR REVIEW

(a) Did the Arbitration Panel's refusal to allow written briefs on relevant issues or to permit oral argument violate Petitioner's right to due process?

(b) Does the Federal Arbitration Act exclude the provision of the South Carolina Arbitration Act where there is no conflict between the two statutes?

(c) Should a lump-sum arbitration award be vacated when it is admitted that there is no evidence to support a material portion of the award.

4. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourteenth Amendment:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

South Carolina Arbitration Statute

S. C. Code §15-48-50

(b) The parties are entitled to be heard and to present evidence material

to the controversy and to cross-examine witnesses appearing at the hearing.

5. REASON FOR GRANTING THE WRIT

This is a case of first impression. Is procedural due process applicable to arbitration proceedings, i.e. the right to present evidence and the right to be heard? If there is a determination that such right is not applicable, then would the provisions of the South Carolina Arbitration Act which requires the opportunity to be heard be supplanted by the Federal Arbitration Act, as found by the South Carolina Supreme Court? The other question is whether an arbitration award should be vacated when there is no evidence to

support a material portion of a lump-sum award.

6. STATEMENT OF THE CASE

Petitioner, George A. Creed & Son, Inc. ("Contractor") entered into a construction contract in the approximate amount of $3,200,000.00 dated August 31, 1977 with Respondent, Trident Technical College ("Owner") pursuant to plans and specifications prepared by Owner's architect, Lucas & Stubbs, Ltd. ("Architect"). Owner terminated the contract by letter dated April 11, 1980. Contractor thereafter demanded arbitration pursuant to the contract and Owner refused to arbitrate. Contractor then petitioned the Court of Common Pleas for Richland

County to compel arbitration. The lower court ordered arbitration which commenced on March 9, 1981. On April 19, 1980, the arbiters rendered their award in the amount of $562,697.68 total damages to Owner, $434,837.88 from Contractor and $127,859.80 from Architect.

Owner and Architect filed motions in the Court of Common Pleas for Charleston County to confirm the award and Contractor filed a motion to vacate the award.

Contractor presented evidence at the hearing before the lower court to show that the arbitration panel refused to allow briefs or oral

arguments on relevant legal issues in violation of Contractor's fundamental right of due process. Contractor further presented evidence that there was a manifest disregard of the facts as to a portion of the award.

The lower court based its decision on the transcript of the arbitration proceeding and determined that the Contractor had not been denied the right to file briefs or present oral argument and that there had been no manifest disregard of the facts. The lower court also based its decision on the grounds that the South Carolina Arbitration Act was supplanted by Federal substative law with respect to

disputes to which the Federal Arbitration Act is applicable.

Contractor excepted to these findings in its appeal to the South Carolina Supreme Court. (B5 - 8). The Supreme Court affirmed the lower court and adopted the lower court's order, with minor amendments.

Contractor petitioned for a rehearing on the grounds that the court had considered facts which were not in the record. The petition was denied on August 13, 1985. The South Carolina Supreme Court, as did the lower court, erroneously based its decision on the transcript of the arbitration proceedings. The transcript was never

introduced and was never a part of the record.

DISCUSSION

I. ARBITRATION HEARING WITHOUT OPPORTUNITY TO FILE BRIEF OR PRESENT ORAL ARGUMENT VIOLATED CONTRACTORS RIGHT TO DUE PROCESS

Each party to an adversary proceeding is entitled to certain fundamental procedural rights which must be adhered to in order to meet the requirements of due process. Such rights cannot be limited or altered by statute (e.g. arbitration, long-arm or other similar statutes).

The question in this case is whether the conduct of the arbitration hearings violated Contractor's right to procedural due process. If such right

was denied, then there is no need to proceed with an analysis of the substantive issues. The many cases cited by the South Carolina Supreme Court as to the limited scope of review under the arbitration statutes are not relevant in the due process determination. The question of procedural due process is independent from and rises above the statutory grounds for confirming or vacating an arbitration award.

The arbitration panel's refusal to allow briefs on relevant legal issues or to permit oral arguments violated Contractor's right to procedural due process.

A hearing is more than a mere opportunity to present evidence. A hearing in its very essence, demands that a party shall have the right to support his allegations by argument. Londoner v. City and County of Denver, 210 U.S. 373, 386, S.Ct. 708, 714, L.Ed. 1103, 1112 (1908). A "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie a decision has not considered argument, it is manifest that the hearing has not been given. Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L.Ed. 1288, 1295 (1936).

Procedural due process requires not only an opportunity to

present evidence, but also an opportunity to be heard either by oral argument or by written briefs. Railroad and Warehouse Commission v. Chicago and Northern Railway Co., et al., 98 N.W. 2d 60 (Minn. 1959) citing Londoner v. City and County of Denver, supra; Morgan v. United States, supra; and Federal Communications Commission v. WJR, 377 U.S. 265, 276, 69 S.Ct. 1097, 1103, 93 L.Ed. 1353, 1360 (1969).

There is no basis for the South Carolina Supreme Court's determination that the record did not support Contractor's allegation that the arbiters denied Contractor the opportunity to file briefs and refused to hear oral argument. Similarly,

there is no basis whatsoever for the South Carolina Supreme Court's finding that:

> Appellant contends that its rights were prejudiced by the arbitrators' denial of the "opportunity to file briefs on all issues. . . " and their refusal to hear "oral argument. . . ." Even assuming arguendo that this allegation was sufficient to come within the ambit of 9 U.S.C. §10(c), the allegation is not supported by the record. At the arbitrators' direction, the parties submitted pretrial memoranda concerning all of their claims, and the panel subsequently requested additional briefs on various issues; at no time, however, was any party precluded from filing briefs or memoranda concerning any issues which they felt were pertinent. Moreover, the transcript indicates that

> considerable oral argument was heard by the panel over the course of forty-one (41) days of proceedings, although the arbitrators did not request closing arguments from counsel.
>
> * * *
>
> The appellant's contention that it was denied due process by the panel's refusal to hear oral argument or receive briefs is likewise unsupported by the record. (A33 - 35)

The South Carolina Supreme Court's purported reliance on the transcript of the arbitration proceedings was erroneous. There was no transcript of the arbitration proceedings before the trial court from which to make the foregoing determinations. The parties stipulated

in the Agreed Statement of the Case that:

> The transcript of the arbitration proceedings which consisted of forty-one (41) volumes and hundreds of exhibits was not offered in evidence or as an exhibit at the hearing before Judge Smith, except for excerts therefrom introduced by Creed along with an affidavit and other exhibits.

Neither Owner nor Architect introduced any portion of the transcript of the arbitration proceedings or any affidavits or other evidence to refute Contractor's position.

The only evidence before the South Carolina Supreme Court was the exhibits and affidavit introduced by Contractor, all of which unequivocably

support Contractor's position. The affidavit of Robert A. Creed states that the parties requested oral argument. (B5). The arbitration panel stated in January, 1982 at the close of the taking of oral testimony that they would decide by March 9, 1982 whether or not arguments would be heard. (B1). The panel had stated in a previous hearing, however, that if the parties did not hear from the panel, then they did not want oral arguments. (B1). Contractor's affidavit further stated that no decision was ever communicated to the parties and that the award was rendered without oral arguments. (B5).

The affidavit of Robert A. Creed specifically states that the

arbitration panel denied Creed's request to file briefs on the basic issues in connection with the question of wrongful termination, e.g., estoppel, waiver, mitigation, burdens of proof, interference, owner's duty to cooperate, prior breach, constructive change in the contract, etc. (B2 -5).

The right to present the contentions of the parties and to point out the inferences and conclusions which they believe should be drawn from the evidence and applicable law, by argument, either oral or written, is as much a part of due process as the right to present evidence itself. Railroad and Warehouse Commission v. Chicago and Northwestern Railway Co., et al.,

supra. Creed was denied this fundamental right. There is nothing in the record to the contrary.

"Arbitration, even as any judicial hearing cannot proceed without evidence and the right of the parties to present argument; it cannot operate in a vacuum." Corbin v. Washington Fire & Marine Ins., Co., 278 F. Supp. 393 (D.S.C. 1968). Corbin appears to be the only case from the Federal courts which addresses procedural due process in an arbitration proceeding.

II. EXCLUSION OF SOUTH CAROLINA ARBITRATION ACT

Assuming arguendo that such procedural due process is not applicable to arbitration proceedings,

the requirement under the South Carolina Arbitration Statute (S.C. Code §15-48-50(b) which requires the opportunity to present evidence and to be heard would not be "supplanted" as determined by the South Carolina Supreme Court. (A8 - A10). See, e.g., California v. Zook, 336 U.S. 725 (1949); Buck v. Californius, 343 U.S. 99 (1952); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); and Colorado Anti-Discrimination Comm. v. Continental Airlines, 372 U.S. 714 (1963).

III. MANIFEST DISREGARD OF FACTS

An award without foundation in reason or fact is equated with an award that exceeds the authority or

jurisdiction of the arbitrators. Brotherhood of Railroads v. Central of Georgia, 415 F.2d 403 (5th Cir. 1969). An award may not stand if it does not meet the test of fundamental rationality. Swift Industries, Inc. v. Botany Industries, Inc., 466 F.2d 1125 (3rd Cir. 1972). If there is no evidence to support the award then the award is deemed irrational and should be set aside. NF&M Corp. v. United Steelworkers of America, 524 F.2d 756 (3rd Cir. 1975); Sun Oil Co. of Pennsylvania v. Local 8-901, et al., 421 F. Supp. 1376 (E.D. Pa. 1976).

Certain amounts charged to Contractor in the award are not supported by any evidence. In some

cases such amounts are not only without support but the record shows that payment should have been the responsibility of others. No attempt was made by Owner or Architect to refute such facts established by Contractor.

The South Carolina Supreme Court casually dismissed Contractor's allegations in a footnote in which it stated that Contractor should have moved under 9 U.S.C. §11 to modify the award instead of 9 U.S.C. §10 to vacate the award. (A15 - A18). The South Carolina Supreme Court misinterpreted 9 U.S.C. §11. This section is available only when the mistake is evident upon the face of the award.

The arbitration award is a lump-sum award. (B9 -B11). The manifest disregard of the facts does not appear on the face of the award. As more particularly discussed hereinafter, a review of the award explanation and portions of the transcript are required to reach such conclusion. The explanation of the award is not part of the award but is part of the arbitration record. The award explanation was introduced into evidence by Contractor without objection.

B-12 GRADE BEAMS. The arbitration panel charged Contractor $3,897.00 for the cost to replace the B-12 grade beams. Owner's engineer

testified that the structural engineer had improperly designed the B-12 grade beams. Owner's engineer further testified that the beams were constructed by Contractor in accordance with the plans. The Architect also testified that the design of the B-12 grade beams was defective. No evidence was offered by Owner to refute the foregoing. There is not rational basis for charging Contractor with the cost to correct an admitted design error.

SIDEWALKS. The arbitration panel deleted the site work, which included sidewalks, from the contract, but the panel included in the calculation of the cost to complete a charge of $17,215.00 for sidewalks. No

evidence was offered by Owner to contradict this obvious error.

SIGN. The panel issued a change order deleting the sign from the contract and then charged Contractor for the cost of the sign in calculating the cost to complete. Again, no evidence by Owner was offered to refute this fact.

ELEVATOR. Another unsupportable portion of the award resulted from the panel's charging Contractor the cost to repair the elevator twice. The panel included $12,276.00 in the award for the cost to complete the elevator which included repairs to the elevator. The panel

also charged Contractor $3,545.00 to repair the damage to the elevator. The cost to repair the elevator was included in both the cost to complete and also in the cost to correct.

There is no evidence whatsoever to support the award against Contractor in connection with the B-12 grade beams, sidewalks, sign or elevator. These items accounted for $28,143.00 of the award. Owner cannot point to any rational basis for this portion of the arbitration award.

There are no statutory provisions or case law which allow a court to correct a portion of a lump-sum award and let the rest of the award stand. The award in connection with

the foregoing items has no basis in fact or reason whatsoever, thus making the entire award suspect. The award should have been vacated under such circumstances.

CONCLUSION

Based upon the above-mentioned reasons, Petitioner, George A. Creed & Son, Inc. requests this Court to grant its Petition for Certiorari.

This 8th day of November,

1985.

Respectfully submitted,

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CERTIFICATE

In acordance with Rule 21 of the Rules of the Supreme Court of the United Staes, I hereby certify that I have this 12th day of November, 1985 mailed the required copies of the Petition for Certiorari to the Clerk's office of the Supreme Court of the United States for the purpose of filing on November 12th, 1985, and have also mailed the required copies of the above mentioned documents to all attorneys of record as follows:

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T. Alexander Beard
T. Alexander Beard
Attorney for Petitioner

SWORN to before me this

12th day of November, 1985.

Bonnie E Hubbs (L.S.)
Notary Public for South Carolina
My Commission Expires: 9/23/93

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Trident Technical College,.. Respondent

Lucas & Stubbs, Ltd. and George A. Creed & Sons, Inc., Defendants, of whom Lucas & Stubbs, Ltd. is also a Respondent and George A. Creed & Son, Inc. is.....Appellant.

Appeal From Charleston County
John Hamilton Smith, Judge

Opinion No. 22350
Heard June 6, 1985 - Filed July 8, 1985

AFFIRMED

T. Alexander Beard, of Cooper, Bowen, Beard & Smoot, of Camden, for Appellant.

W. H. Bundy, Jr., of Howe & Bundy; and A. Arthur Rosenblum, both of Charleston; and Assistant Attorneys General Victor S. Evans, Judith Evans Finuf and Grady L. Patterson, III, all of Columbia, for Respondent Trident Technical College; and Claron A. Robertson, III, of Buist, Moore, Smythe & McGee, of Charleston, for Respondent Lucas & Stubbs, Ltd.

PER CURIAM: This is an appeal from an arbitration award. We affirm and adopt the trial court's Order, as amended.

I. INTRODUCTION

This matter is before the Court upon the motion of respondents Trident Technical College (TTC) and Lucas & Stubbs (L&S) to confirm an arbitration award. Appellant George A. Creed & Son, Inc. (Creed) has opposed the motions with a motion to vacate the arbitrator's award.

II. FINDINGS OF FACT

On August 31, 1977 TTC entered into a negotiated contract with L & S to design and supervise the

construction of a new campus on the Ashley River in Charleston, South Carolina. On August 26, 1978, TTC entered into a standard form AIA contract with Creed to construct the campus pursuant to the plans and specifications of L&S for approximately $3,200,000.00. The contract called for substantial completion of the building to occur in early April 1980. Both of the contracts required all disputes to be resolved by arbitration, with such arbitration to be conducted by the American Arbitration Association. The project was plagued by numerous problems from its inception and, finally, in April of 1980, L & S certified to TTC that reasonable cause existed to terminate Creed's contract;

this was done by the owner in a letter dated April 11, 1980.

On April 21, 1980 Creed demanded arbitration pursuant to the contract, claiming damages in an amount that was later set by Creed at $2,051,933.77. TTC refused to arbitrate and on April 30, 1980, Creed petitioned this Court to compel TTC to arbitrate under the Federal Arbitration Act, 9 U.S.C. §§1-14. On May 20, 1980 a hearing was held before the Honorable Walter J. Bristow, Jr., who issued an order finding that the federal act was applicable and requiring TTC to arbitrate. No appeal was perfected from that order.

On July 16, 1980 TTC filed a demand for arbitration with L & S and also filed a petition to consolidate the arbitration between Creed and TTC and between TTC and L & S into a single proceeding. On September 4, 1980, the Honorable Richard E. Fields issued an order requiring that the entire matter be consolidated as requested.

Thereafter, on December 11, 1980 a pretrail conference was held between the parties, in the presence of the arbitrators, at which time discovery procedures and other issues were discussed. Also during that pretrial conference, the parties were instructed by the arbitrators to submit detailed outlines of their claims

against each other, so that the parties would be better informed concerning the issues to be arbitrated.

The arbitration hearings commenced on March 9, 1981 before three arbitrators selected by the American Arbitration Association; this panel consisted of a lawyer, a general contractor, and an architect, all residing in the State of North Carolina as requested by Creed. Over the course of the next eleven months, the arbitration eventually totalled forty-one separate days of proceedings, which were transcribed for the record along with the numerous exhibits introduced by the parties. The total expense to the parties for the arbitration process

itself, including arbitration expenses, administration, and arbitrators' compensation, was $165,711.19. Of course, this figure does not include the substantial expenses borne by the parties for attorneys' fees, expert witness fees, and other costs. On April 19, 1980 the arbitrators rendered their award of $562,697.68 total damages to TTC, $434,837.88 from Creed and $127,859.80 from L & S. Immediately thereafter, L & S tendered its payment in full to TTC.

III. CONCLUSIONS OF LAW

A. Applicable Law

The Federal Arbitration Act, 9 U.S.C. §§1-14 evidences the well-established federal policy favoring the arbitration of disputes. See J. S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F. 2d 212 (5th Cir. 1973); Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393 (D.S.C. 1968), aff'd 398 F. 2d 543 (4th Cir. 1968).

While this policy favoring the arbitration of disputes is also well established in South Carolina, both in its statutory, S. C. Code Ann. §15-47-

10 (1976),[1] and decisional law, Harwell v. Home Mutual Fire Ins. Co., 228 S. C. 594, 91 S. E. 2d 273 (1956); Bollmann v. Bollmann, 6 S. C. 29 (1874), this state law is supplanted by federal substantive law with respect to

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1. The current statutory law of South Carolina concerning arbitration is the Uniform Arbitration Act, S. C. Code Ann. §§15-48-10 - 15-48-240 (Cum. Supp. 1984), which repealed the previous statutory provisions, §§15-47-10 - 15-47-50 (1976); however, the Uniform Arbitration Act cannot be applied retroactively, §15-48-210 (Cum. Supp. 1984), and is therefore inapplicable to contracts entered into before May 8, 1978.

disputes to which the Federal Arbitration Act is applicable.[2] See In re Mercury Constr. Corp. 656 F. 2d 933 (4th Cir. 1981); Episcopal Housing Corp. v. Federal Ins. Co., 269 S. C. 631, 239 S. E. 2d 547 (1977).

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2. Generally speaking, the Federal Arbitration Act is applicable to maritime transactions and transactions involving "commerce among the several States. . . ." 9 U.S.C. §1. See §2. In the present case, which unquestionably involves interstate commerce, the applicability of the federal act has been established as the law of the case.

> [W]e are here dealing not with state-created rights, but with rights arising out of the exercise by the Congress of its constitutional power to regulate commerce and hence there is involved no difficult question of constitutional law under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 404-405 (2d Cir. 1959). Thus, the Federal Arbitration Act "is a declaration of national law equally applicable in state or federal court." Id. at 407.

B. Federal Arbitration Act

1. Generally

As previously indicated, the Federal Arbitration Act, 9 U.S.C. §§1-

14, is intended to advance the "federal policy in favor of arbitration of disputes." Bruno v. Pepperidge Farm, Inc., 256 F. Supp. 865, 867 (D. Pa. 1966). The fundamental premise upon which this policy is grounded is the laudable goal of providing "a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." Diapulse Corp. of America v. Carba Ltd., 626 F. 2d 1108, 1110 (2d Cir. 1980). Moreover, the Act also serves to "help ease congested court dockets." Tepper Realty Co. v. Mosaic Tile Co., 259 F. Supp. 688, 693 (D. N.Y. 1966). As succinctly stated by the court in Farris v. Alaska Airlines, Inc., 113 F.

Supp. 907, 908 (D. Wash. 1953): "The primary function of arbitration is to serve as a substitute for and not a prelude to litigation."

In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted. See 9 U.S.C. §§9-11. "[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. . . ." Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F. 2d 805, 808 (2d Cir. 1960), cert denied, 363 U. S. 843 (1960). Indeed,

"[b]road judicial review on the merits would render resort to arbitration wasteful and superfluous. . . ." Farris v. Alaska Airlines, Inc., supra at 908. Consequently, a court "may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§10 and 11 is found to exist." Diapulse Corp. of America v. Carba, Ltd., supra at 1110.

2. Grounds for Vacating Award

Section 10 of the Federal Arbitration Act provides that an

arbitration award may be vacated[3]

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3. Section 11 of the Act provides that an arbitration award can be modified on three other grounds:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or proeprty referred to in the award.

on four grounds:

(a) Where the award was

(cont.)

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits

procured by
corruption, fraud,
or undue means.

(b) Where there was
evident partiality
or corruption in the
arbitrators, or
either of them.

(cont.)

of controversy.

9 U.S.C. §11(a)-(c). However, Creed has moved only to vacate the award, and, therefore, even assuming arguendo the factual relevance of §11, the award cannot be modified. Petrol Corp. v. Groupement D'Achat Des Carburants, 83

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any

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(cont.)

F. Supp. 446 (D. N.Y. 1949).

party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

9 U.S.C. §10(a)-(d). These grounds must be construed in light of the rule that the Court's function in vacating, or confirming, an arbitration award is severely limited. Newark Sterootypers'

Union No. 18 v. Newark Morning Ledger Co., 261 F. Supp. 832 (D. N.J. 1966), aff'd 397 F. 2d 594 (3d Cir. 1968), cert. denied, 393 U.S. 954 (1968).

In its motion, Creed asserts that the arbitration award here should

> be vacated on the grounds that (i) the arbitrators exceeded their powers; (ii) the award was procured by undue means by virtue of the manifest disregard of the law and facts; (iii) the arbiters refused to hear evidence/law material to the controversy; and (iv) the arbiters otherwise so conducted the hearings as to prejudice substantially the

rights of George A. Creed & Son, Inc.

a) Scope of arbiters' authority

Appellant's first ground tracks the language of 9 U.S.C. §10(d), but reliance on that subsection is misplaced. The question of whether the arbitrators exceeded their power relates to the arbitrability of the underlying dispute. See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement. Id. Conversely, if the issues presented to the arbitrators are within the scope of the arbitration agreement, subsection

(d) does not require the court to "review the merits of every construction of the contract." Id. at 598-99.

In the present case, the issues presented to the arbitration panel consisted solely of the claims between the parties regarding the design and construction of the TTC Ashley River Campus; it is beyond dispute that these issues are within the scope of the arbitration clauses in the contracts between L & S and TTC and between TTC and Creed and, therefore, these issues are arbitrable. Indeed, the arbitration of these issues was commenced by Creed's demand for arbitration, and it has vigorously and

repeatedly maintained that the issues were arbitrable. The courts have

> consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards "[w]hen the arbitrators exceeded their powers," 9 U.S.C. §10(d), especially where that language has been invoked in the context of the arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.
>
> Trident v. Creed

In The Matter of Andros Compania Maritima, S. A. and Marc Rich & Co.,

A.G., 579 F. 2d 691, 703 (2d Cir. 1978).

Clearly, Creed is attempting to relitigate the merits of the arbitration panel's resolution of concededly arbitrable issues under the guise of questioning the panel's power and authority; this is not proper. Amoco Oil Co. v. Oil, Chem. & Atomic Workers Internat. Union, 548 F. 2d 1288 (7th Cir. 1977), cert. denied, 431 U.S. 905 (1977). Even assuming arguendo that the award misconstrued the contracts, this would not constitute an abuse of the arbitrator's power under 9 U.S.C. §10(d). National Railroad Passenger Corp. v. Chesapeake & O. Ry. Co., 551 F. 2d 136 (7th Cir. 1977).

(b) Manifest disregard of the law

Appellant's second ground that "the award was procured by undue means by virtue of the parties' manifest disregard of the law and facts" apparently stems from language borrowed from both 9 U.S.C. §10(a) and decisional law under §10(d). See e.g., Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (arbitrators may exceed their powers if their award reflects a "manifest disregard" of the law).

To the extent that this ground is predicated on 9 U.S.C. §10(a), it is without merit. The phrase "corruption, fraud, or undue means" has been

construed by the court to proscribe affirmative misconduct by the parties, such as perjury or subornation of perjury. See Newark Sterotypers' Union No. 18 v. Newark Morning Ledger Co., supra; Karppinen v. Karl Kiefer Machine Co., 187 F. 2d (2d Cir 1951). This subsection does not reach "the parties' manifest disregard of the law and facts," and such an allegation is insufficient to constitute "undue means" under 9 U.S.C. §10(a) absent a finding of bad faith, fraud, or corruption. Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104 (D. Ill. 1980). Moreover, even if appellant was to phrase this objection so as to ostensibly fall within §10(a), appellant has not discharged its heavy

burden to make it "abundantly clear that [the award] was obtained through undue means." General Constr. Co. v. Hering Realty Co., 201 F. Supp. 487, 491 (D. S.C. 1962).

To the extent that this ground is predicted on the decisional law proscribing the arbitrators' manifest disregard of the law, e.g., Wilko v. Swan, 346 U.S. 427 (1953), it is also unavailing. First, this case law is directed to the conduct of the arbitrators, not that of the parties. Second, the case law presupposes something beyond a mere error in construing or applying the law. Raytheon Co. v. Rheem Mfg. Co., 322 F. 2d 173, 183 (9th Cir. 1963); Grambling

v. Food Machinery & Chem. Corp., 151 F. Supp. 853 (D. S.C. 1957). Indeed, even a "clearly erroneous interpretation of the contract" cannot be disturbed. I/S Stavborg v. National Metal Converters, Inc., 500 F. 2d 424, 432 (2d Cir. 1974).

Appellant asserts that the courts have not hesitated in appropriate cases to vacate an arbitration award where there is a manifest disregard or perverse misconstruction of the law. While this is certainly true, those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law. Indeed, the cases relied upon

by appellant all contain the explicit caveat that "the nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards. . .presuppose[s] 'something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law." Drayer v. Krasner, 572 F. 2d 348, 352 (2d Cir. 1978), quoting San Martine Compania de Navegacian, S. A. v. Saquenay Terminals, Ltd., 293 F. 2d 796, 801 (9th Cir. 1961). Even assuming arguendo that the arbitrators did erroneously apply the law in the various particulars alleged by appellant, these legal errors would be insufficient to constitute manifest

disregard of the law under the pertinent cases.

Thus, appellant's assertion that "the award was procured by undue means by virtue of manifest disregard of the law and facts does not fall within the ambit of 9 U.S.C. §10(a) or the decisional law proscribing manifest disregard of the law under §10(d). See Wilko v. Swan, supra.

(c) Refusal to hear evidence

Apellant's third ground is similar to the second, advancing an objection predicated on the arbitrators' reception of evidence and application of the law. As previously

discussed, "[t]he award may not be examined for alleged mistakes of law and erroneous evaluation of evidence." Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., supra, 261 F. Supp. at 835. Refusal to receive evidence can only furnish a basis for vacating an arbitration award when it rises to the level of "misconduct" or "misbehavior" under 9 U.S.C. §10(c). Id. The panel's conduct of the arbitration proceedings was fundamentally fair, and any evidentiary errors or misinterpretations of law do not rise to the level of misconduct. See, e.g., Fairchild & Co., Inc. v. Richmond, F. & P. R. Co., 516 F. Supp. 1305 (D. D.C. 1981). Moreover, as previously discussed, appellant cannot

relitigate the arbitrators' construction and application of the law. The courts have "generally refused to second guess an arbitrator's resolution of a contract dispute." John T. Brady & Co. v. Form-Eze Systems, Inc., 623 F. 2d 261, 264 (2d Cir. 1980).

(d) Prejudice to party's rights

Appellant's fourth ground, that "the arbiters otherwise so conducted the hearings as to prejudice substantially the rights of George A. Creed & Son, Inc." is likewise defective. Under 9 U.S.C. §10(c), an award may be vacated for

"arbitrators['] . . . .misbehavior by which the rights of any party have been prejudiced." However, as with "misconduct" under §10(c), prejudicial misbehavior requires a level of misconduct on the part of the arbitrators that is not present here. See, e.g., Ballantine Books, Inc. v. Capital Dist. Co., 302 F. 2d 17 (2d Cir. 1962). The touchstone in considering claims of arbitrator misconduct is fairness, Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276 (D. N.Y. 1979), and the arbitration proceedings here were unquestionably fair and impartial.

Appellant contends that its rights were prejudiced by the

arbitrators' denial of the "opportunity to file briefs on all issues. . . " and their refusal to hear "oral argument. . . .," Even assuming arguendo that this allegation was sufficient to come within the ambit of 9 U.S.C. §10(c), the allegation is not supported by the record. At the arbitrator's direction, the parties submitted pretrial memoranda concerning all of their claims, and the panel subsequently requested additional briefs on various issues; at no time, however, was any party precluded from filing briefs or memoranda concerning any issues which they felt were pertinent. Moreover, the transcript indicates that considerable oral argument was heard by the panel over the course of forty-one

days of proceedings, although the arbitrators did not request closing arguments from counsel. Of course, this is not surprising in light of the availability of the transcript and numerous exhibits, as well as the legal memoranda of the parties, for the panel's review. In any case, absent some showing of unfairness, this court will not re-examine every minute detail concerning the mode and conduct of the arbitration proceedings under 9 U.S.C. §10(c).

The appellant's contention that it was denied due process by the panel's refusal to hear oral argument or receive briefs is likewise unsupported by the record.

3. Confirmation of Arbitration Award

Generally speaking, "[a]n award within the scope of submission is conclusive on fact issues and interpretation of law." Oinoussian Steamship Corp. v. Sabre Shipping Corp., 224 F. Supp. 807, 809 (D. N.Y. 1963) (footnote omitted). The award is presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award." Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., supra, 261 F. Supp. at 835. Otherwise, an arbitration award would signify "the commencement, not the end, of litigation." Id. (emphasis in original).

Moreover, the arbitrators need not specify their reasoning or the basis of the award, See, John T. Brady & Co. v. Form-Eze Systems, Inc., supra, so long as the factual inferences and legal conclusions supporting the award are "barely colorable." (In the Matter of Andros Compania Maritima, S. A. and Marc Rich & Co., A. G., supra, 579 F. 2d at 704. "If a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." Kurt Orban Co. v. Angeles Metal Systems, 573 F. 2d 739, 740 (2d Cir. 1978).

The Federal Arbitration Act essentially requires that this Court must "uphold the award unless the

challenging party demonstrates one of the infirmities listed in §10 of the Act." Maidman v. O'Brien, 473 F. Supp. 25, 28 (D. N.Y. 1979). The appellant has failed to discharge this burden. Taken in the context of an arbitration record consisting of over forty volumes of transcripts and exhibits, the legal errors alleged by Creed and purportedly supported by the fragmentary excerpts from the record simply do not constitute sufficient grounds for vacating the award under 9 U.S.C. §10.

The appellant's remaining assertions lack merit.

The judgment below is, accordingly,

AFFIRMED.

s/ C. Bruce Littlejohn C.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

PORTION OF TRANSCRIPT OF RECORD

A. Brief and Oral Argument.

MR. ROBERTSON: When is the oral argument, if any scheduled? You said something about coming to Greensboro.

ARBITRATOR FOSTER: If any, it will be scheduled after March the 9th. We will determine the need or lack of need for oral argument on March the 9th and we'll let you know. (Tr. 157).

MR. ROBERTSON: Will you tell us whether you want oral argument; and, if you don't---

ARBITRATOR FOSTER: If you don't hear from us, we don't. (Tr. 153).

STATE OF SOUTH CAROLINA	)	AFFIDAVIT
	)	OF
COUNTY OF KERSHAW	)	ROBERT A. CREED

PERSONALLY appeared before me Robert A. Creed, who, being first duly sworn, made oath that he is an officer and director of George A. Creed & Son, Inc.; that he is familiar with the construction contract between Trident Technical College and George A. Creed & Son, Inc.; that he participated in the arbitration hearings between Trident and Creed; and, in regard to such arbitration hearings, that:

2. On April 29, 1980 Creed made a timely demand for arbitration pursuant to the contract, seeking among other things, damages for the wrongful termination of said contract. Tr. 158.

4. The arbitration hearings commenced on March 9, 1981 with hearings held thereafter for approximately four or five days each month through January 1982.

5. The arbitration panel requested each party to submit a list of issues to be briefed. Creed submitted the following list of issues:

1. Prior breach of contract by Owner.
   - A. Incompetent inspector (Jeff King) as interference with the contract and a breach of the Owner's duty to cooperate.
   - B. Cumulative effect of the many breaches by Owner as a breach of the contract and/or constructive change in the contract.
2. Owner is estopped to assert ground for termination other than matters known at the time of termination.
3. Waiver of non-conforming work.
4. Owner's duty to mitigate damages.
5. Owner has the burden of proof as to defects.

6. Owner has the burden of proving the amount of its damages claimed with reasonable certainty.
7. Election of Substantive Rights.
   . Difference between Election of Remedies vs. Election of Substantive Rights.
   B. Stop work order pursuant to Section 3.3.1 is intended to stop work while existing work is being corrected and is not intended to stop all work while an Owner decides what he wants to do.

6. The arbitration panel stated that they did not want briefs on all of the issues set forth in Number 5 above, but did request briefs on the following peripheral issues:

1. Availability of liquidated damages after termination.
2. Taxation of attorney's fees, expert witness fees, and testing costs.
3. Degree of lateness which justifies termination.
4. Defective or non-conforming work as justification for

termination.

5. Limiting cost of completion to amounts in subcontract. (Tr. 160).

7. The parties requested that opportunity for oral arguments but no decision was ever communicated to the parties. The award was rendered without oral argument.

B. EXCEPTIONS

1. The Trial Court erred in its finding that Creed was given the opportunity to file briefs or oral argument on relevant legal issues, the error being that the record shows that such opportunity was denied by the arbitration panel. (Tr.164).

3. The Trial Court erred in its conclusion that the arbitration panel's refusal to allow briefs or oral argument on relevant legal issues did not substantially prejudice the rights

of Creed, the error being that such denial violated Creed's fundamental right of due process. (Tr.164).

8. The Trial Court erred in its conclusion that the Federal Arbitration Act has been established as the law of this case to the exclusion of the South Carolina Uniform Arbitration Act, the error being that the South Carolina Act is not excluded unles there is a direct conflict between the State and Federal Act and there is no such conflict in this case. (Tr.165).

19. The Trial Court erred in its finding that there was no manifest disregard of the facts, the error being that the Trial Court's conclusion

ignored the fact that the arbitration panel's award against Creed for the cost to correct B-2 grade beams was irrational when all the evidence showed that the defect was caused by a design error. (Tr.168).

20. The Trial Court erred in its findings that there was no manifest disregard of the facts, the error being that the Trial Court's conclusion ignored the fact that there was no basis in the record for the arbitration panel's award of damages for the cost to complete sidewalks which had been deleted from the contract. (Tr.168).

21. The Trial Court erred in its finding that there was no manifest disregard of the facts, the error being

that the Trial Court's conclusion ignored the fact that there was no basis in the record for the arbitration panel's award of damages for the cost of constructing a sign which had been deleted from the contract. (Tr.169).

22. The Trial Court erred in its finding that there was no manifest disregard of the facts, the error being that the record shows that the arbitration panel charged Creed twice for the cost to repair the elevator. (Tr.169).

24. The Trial Court erred in its confirmation of the arbitration award, the error being that the Court based its decision upon portions of the

transcript of the arbitration hearing which were not part of the record before the Trial Court. (Tr.169).

C. AWARD OF ARBITRATOR(S)

I, (WE), THE UNDERSIGNED ARBITRATOR(S) having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated Spetmeber 26, 1982 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

See attached

Total award to Respondent Trident Technical College Area Commission:

1)	from Claimant [Contractor]	$434,837.88
2)	from Respondent Lucas & Stubbs Assoc., Ltd.	$127,859.80

* * *

STATEMENT OF AWARD

Cost to complete		$1,198,504.00
Cost to correct defective work		371,908.00
Total		$1,570,412.00
Balance in contract		1,113,752.14
Due owner	$	456,659.86
Taxation of cost in favor of owner		
1) Arbitration Expenses		None
2) Testing and expert witnesses	$	55,076.44
3) Allowable expenses since termination		84,699.25
Total due Owner/ Respondent Trident Technical College Area Commission	$	596,435.55
1) From Claimant	$	434,837.88

2) From Respondent Lucas & Stubbs Associates Ltd. $161,597.67

LESS: Allowed claim for services 33,737.87

$ 127,859.80

Extension of time to Claimant 60 days

Interest on Award From May 6, 1982

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-829

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

GEORGE A. CREED & SON, INC. — **PETITIONER**

vs.

TRIDENT TECHNICAL COLLEGE AND LUCAS & STUBBS, LTD. — **RESPONDENTS**

BRIEF IN OPPOSITION OF RESPONDENT TRIDENT TECHNICAL COLLEGE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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TRANSCRIPT OF RECORD

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STATEMENT OF CASE

George A. Creed & Son, Inc., (Contractor), pursuant to a contract with Trident Technical College (Owner) to construct buildings for approximately $3,200,000 in Charleston, South Carolina, demanded and proceeded to arbitrate a dispute between the parties as a result of the contract's termination. Arbitration commenced on March 9, 1981, and continued over a course of eleven months. The transcript of the proceedings consisted of 41 volumes and hundreds of exhibits. The Arbitration Panel found for the Owner against the Contractor and the Architect who had been joined in the proceedings. Both parties moved before the State Circuit Court, the Owner to confirm and the Contractor to set aside the award.

The Circuit Court confirmed the arbitration award, finding that there was a lack of proof by the Contractor that he was denied due process in the disallowance of briefs and oral argument or otherwise.

The Order was appealed to the South Carolina Supreme Court which affirmed the findings of the Court below.

ARGUMENT

I. DID THE ARBITRATION PANEL REFUSE TO ALLOW WRITTEN BRIEFS ON RELEVANT ISSUES OR TO PERMIT ORAL ARGUMENT SO AS TO VIOLATE PETITIONER'S RIGHT TO DUE PROCESS?

The question as framed by the Contractor is the gist of his claim. The question, however, assumes a fact which both the Circuit and South Carolina Supreme Court determined had not been proven by the record. The Contractor conceded that the transcript of the arbitration did not support his claim (TR. before S.C. Sup. Ct. p. 51). Rather than offer the transcript for consideration of the Circuit Court, he attempted to make a record by an affidavit of the Contractor.

The Circuit Court found that the parties submitted detailed memoranda of their claims as well as additional briefs on various issues to the Arbitration Panel. The Contractor does not contend that he objected to the procedure on Memoranda and argument set by the Arbitration Panel. The court below held that the allegations by the Contractor that he was denied the opportunity to file briefs or that he was refused the right to make arguments was not supported by the record (TR. before Sup. Ct. p. 43). The Court further found, as did the Supreme Court, that assuming no oral argument was permitted there was no showing of any unfairness. *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276 (S.D. N.Y. 1979). Clearly the Contractor failed to meet his burden of establishing misconduct which was so prejudicial as would justify setting aside the award (9 U.S.C. § 10 [a] [d]).

I. DOES THE FEDERAL ARBITRATION ACT EXCLUDE THE PROVISIONS OF THE SOUTH CAROLINA ARBITRATION ACT WHERE THERE IS NO CONFLICT BETWEEN THE TWO STATUTES?

It is interesting that the Contractor now claims that he is entitled to the benefit of the South Carolina Arbitration Statute. When the Owner originally contested the Contractor's right to arbitration, the Contractor argued successfully that the South Carolina Act had no application. The Circuit Court, in its order requiring arbitration, specifically held that the Federal Act was controlling, not only over the common law of South Carolina but the statutory law of the State in this case. (TR. Sup. Ct. p. 93) Clearly, the Contractor is bound by that Order.

III. SHALL A LUMP SUM ARBITRATION ORDER BE VACATED WHEN IT ADMITTED THAT THERE IS NO EVIDENCE TO SUPPORT A MATERIAL PORTION OF THE AWARD?

The Owner has not admitted on the record or at any time that there was insufficient evidence to support the award. Both the South Carolina Circuit Court and the South Carolina Supreme Court found the evidence sufficient, and Petitioner's statement of this question is incorrect and misleading. The Contractor claims that a material portion of the award was improper relying solely upon his interpretation of an explanation of the award, which accompanied the transmittal letter from the Arbitration Panel. The letter specifically stated that such explanation was unofficial and not a part of the award. (TR. Sup. Ct. p. 20.)

The lower court considered this very issue as did the South Carolina Supreme Court. Both courts held that there was no showing made by the Contractor sufficient to set aside the award. The Contractor now attempts to relitigate the very issues which were addressed by way of the arbitration proceedings, which were had at his insistence.

CONCLUSION

An arbitration award is presumptively correct. *Newark Stenotypers Union v. Newark Morning Ledger*, 261 F. Supp. 832 (D.C. N.J. 1966). No substantial Federal question is raised in the Petition even by argument, and certainly no question of general public interest meriting review by the United States Supreme Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By: Frank K. Sloan
Attorneys for Respondent
Trident Technical College

Charleston, S.C.
December 12, 1985.

CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 12th day of December, 1985, mailed postage pre-paid the required copies of the Brief in Opposition to Petition for Certiorari to the Clerk's office of the Supreme Court of the United States for the purpose of filing on December 12, 1985, and have also mailed postage pre-paid the required copies of the above-mentioned documents to all attorneys of record as follows:

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s/
FRANK K. SLOAN
Attorney for Respondent
Trident Technical College

SWORN to before me this
12th day of December 1985.

s/ Peggy P. Whitney (L.S.)
Notary Public for South Carolina